

APPLICATION BY	§	BEFORE THE
	§	
CITY OF ROCKPORT FOR	§	TEXAS COMMISSION ON
	§	
TPDES PERMIT NO. WQ0010054001	§	ENVIRONMENTAL QUALITY

CAPTAIN TOMMY MOORE’S REPLY TO RESPONSES TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Captain Tommy Moore (Capt. Moore) and pursuant to 30 TEX. ADMIN. CODE § 55.209 (g) files this Reply to the Executive Director’s, the City of Rockport’s, and the Office of Public Interest Counsel’s Responses to Hearing Requests and would respectfully show the following:

I. INTRODUCTION

The City of Rockport (Applicant) seeks renewal of a Texas Pollution Discharge Elimination System (TPDES) Permit allowing the discharge of treated wastewater into Tule Ditch which flows into Tule Creek and Little Bay. The draft permit would reauthorize the discharge of up to 2.5 million gallons per day of treated domestic sewage into a sensitive estuarine ecosystem *without* limitations on nutrient discharge. The TCEQ recently issued two TPDES permits in the immediate vicinity of Rockport. Both permits contained stringent nutrient limitations even though these discharges are into larger and/or less sensitive bodies of water than Little Bay.

It is widely accepted and recognized that the receiving waters of Little Bay have experienced a significant nutrient caused decline. *See* the Executive Directors Response to Comments at page 6 (“The concerns regarding the degradation of Little Bay are valid”); *See also Id.* at page 11 (“prior to the public meeting, a mat of algae was observed floating near [the]

main entrance from Little Bay to Aransas Bay. It is evident that Little Bay is experiencing a nutrient problem.”). The Executive Director of the TCEQ (ED) received numerous comments on its proposed draft permit, many of which focused on the decline of Little Bay and its relation to the Applicant’s discharge. The ED responded, in part, by requiring additional monitoring of nutrients, namely total nitrogen and total phosphorus as a special condition in the permit. However, the ED failed to require limitations on these nutrients.

The Applicant, without prompting from the TCEQ, has commissioned and paid for a study of nutrient inputs into and their impact on Little Bay. The City has also commissioned engineering and design work to add nitrogen removal to its wastewater treatment process to bring total nitrogen levels down to at least 6 mg/l. It is our understanding that the Mayor of Rockport has publicly declared that the City’s wastewater plant discharges too many nutrients and is negatively affecting Little Bay.

Whether or not the Applicant’s discharge has caused or contributed to the decline of the receiving waters of Little Bay is essential to determining whether Capt. Moore and other hearing requestors have a right to a evidentiary hearing under the Texas Water Code. If the Applicant’s discharge has in fact caused or contributed to the decline of Little Bay, the discharge is a violation of both federal and state law and is therefore unauthorized under the terms of both the expired and proposed TPDES permit. If such is the case, as is indicated by the City’s actions and statements, the TCEQ’s failure to remedy this obvious violation may be actionable under federal law.

The great irony of this case is that the Applicant knows its discharge is degrading Little Bay and is trying to take action to remedy and lessen the harm it has done. The ED on the other

hand, continues to recommend that the Applicant merely ignore its offending discharge¹, and thus is leading both the Applicant and the Commission into violating federal law and opening them to the liability of citizen led enforcement. The likely result of the Commission's failure to hold an evidentiary hearing on the discharge and its degradation of Little Bay is costly and lengthy federal litigation for both the Applicant and the Commission.

The citizens of Rockport and the people of Texas are fed up with the obvious and willful neglect of such a precious resource. Little Bay was once a gem in the center of Rockport, an easily accessible public display of the majesty of the saltwater flats common to the middle and southern Texas coast. Lax regulation may have left Little Bay murky and barren, but the tide has turned. The people have had enough.

II. THE COMMISSION HAS DISCRETION TO AND SHOULD HOLD A HEARING REGARDLESS OF RIGHT

The ED, the Applicant and the TCEQ's Office of Public Interest Counsel (OPIC) have spent considerable time in their respective responses discussing the limitations on the right to a hearing under and 30 TEX. ADMIN. CODE § 55.201(i). See also TEX. WATER CODE § 26.028(d). Regardless of these arguments, the Commission has the power and discretion to conduct hearings when and where it sees fit. The Texas Water Code states that "[t]he commission may call and hold hearings, administer oaths, receive evidence at the hearing, issue subpoenas to compel the attendance of witnesses and the production of papers and documents related to the hearing, and make findings of fact and decisions with respect to administering the provisions of this chapter or the rules, orders, or other actions of the commission." TEX. WATER CODE § 26.020. The TCEQ regulations clearly state that "Notwithstanding any other commission rules, the

¹ Capt. Moore views the ED's new nutrient monitoring requirements as disingenuous. The degradation of Little Bay is obvious and there has already been sufficient monitoring of nutrients in the discharge to know that they are a problem.

commission may refer an application to SOAH if the commission determines that ... (1) a hearing would be in the public interest.” 30 TEX ADMIN. CODE § 55.211(d).

Texas law and TCEQ regulations clearly give the Commission the ability to exercise discretion and grant a contested case hearing on this application for renewal of a TPDES permit. The federal Nation Pollution Discharge Elimination System (NPDES) regulations which bind and inform this Commission require the TCEQ to, “hold a public hearing whenever... [there is] a significant degree of public interest in a draft permit.” 40 C.F.R. § 124.12. *See also* 40 C.F.R. § 123.25 (making the federal regulation binding on states programs). The TCEQ received over 100 timely comments on the draft permit and is now considering 21 requests for a contested case hearing. The public clearly desires that this draft permit be put through the rigors of an evidentiary hearing. Federal regulations either suggest or require a hearing. Granting this hearing request would promote the NPDES and TPDES’s goal of encouraging public participation and involvement in the permitting process. Not to mention the overall goal of protecting the Nation’s and Texas’ waters.

Nothing is lost and a recovery of Little Bay will be gained by exposing this draft permit to the scrutiny of an evidentiary hearing. There is every indication that the discharge is degrading Little Bay. It is a matter of simple arithmetic. Little Bay has experienced eutrophication from an over abundance of nutrients. We know without question that the Applicant’s discharge contains a significant amount of nutrients and flows into the upper tidal reaches of Little Bay without a significant opportunity for dilution. Both the City of Rockport and the public seem to understand that two plus two equals four.

Both Texas and federal law prohibit the degradation of the water and ecosystem of Little Bay. 40 C.F.R. § 131.12; 30 TEX. ADMIN. CODE §307.4; 30 TEX. ADMIN. CODE § 307.5. In fact, 30 TEX. ADMIN. CODE § 307.4(e) requires that:

Nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use. Site-specific nutrient criteria, ***nutrient permit limitations***, and/or separate rules to control nutrients in individual watersheds ***will be established where appropriate after notice and opportunity for public participation and proper hearing.***”

(emphasis added). Both the TCEQ and the Applicant have admitted publicly that Little Bay is experiencing problems associated with excess nutrients. The proper procedure under TCEQ regulations is to develop nutrient permit limitations and hold a proper hearing on the matter. Using the TCEQ’s administrative process to develop the proper limitations for nutrients and other relevant pollutants is the less costly and less burdensome way for the parties to proceed. A contested case hearing is necessary and serves the public interest.

III. THE AFFECTED PARTIES HAVE A RIGHT TO A HEARING UNDER TEXAS LAW

The ED, the Applicant, and the OPIC all argue in their responses that 30 TEX. ADMIN. CODE § 55.201(i)(5) eliminates an affected party’s right to a contested case hearing. The regulation states that there is no right to a contested case hearing when:

(A) the applicant is not applying to:

- (i) increase significantly the quantity of waste authorized to be discharged; or
- (ii) change materially the pattern or place of discharge;

- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for a public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material terms in the permit.

30 TEX. ADMIN. CODE § 55.201(i)(5).

To begin with, section 55.201(i)(5) assumes that the discharge is legitimate and does not violate the law. As we have shown and discussed at length, it is a near certainty that the discharge is at the very least significantly contributing to the degradation of Little Bay. This makes the discharge a violation of both state and federal law, especially the antidegradation provisions of federal and state water quality rules. Interpreting § 55.201(i)(5) to allow the renewal of an unlawful permit would put § 55.201(i)(5) in direct conflict with both federal and state water quality standards. It only makes sense that § 55.201(i)(5) is limited to lawful, non-offending discharges. Not only does the repeated use of the word “authorized” make this clear, but our rules of statutory interpretation and common sense dictate that § 55.201(i)(5) should not apply to this renewal application.

Second, we have reliable reports that the City of Rockport has experienced significant and repeated releases of raw sewage from its sanitary sewer infrastructure. Many of these releases of raw sewage may not be listed on the Applicant's compliance history although the Applicant's compliance history shows numerous other “moderate” violations of TCEQ rules in the past five years. Capt. Moore argues that theses compliance failures put at issue the

Applicant's ability to comply with TCEQ regulations and the material terms of the permit. Because of this, Capt. Moore has requested that the Applicant's compliance history and its future ability to comply with TCEQ regulations and the TPDES permit, if any, be referred to SOAH as part of a contested case hearing. Because the Applicant's compliance history raises questions about its ability to comply with the material terms of the permit, the use of 30 TEX. ADMIN. CODE § 55.201(i)(5) to deny the affected public their right to a hearing is inappropriate. *See* 30 TEX. ADMIN. CODE § 55.201(i)(5)(E).

IV. THE APPLICANT'S STUDY OF LITTLE BAY IS UNTIMELY

Both the Applicant and the ED rely heavily on the executive summary and power point of a study into the water quality, sediment quality, and sea grass health of Little Bay. *See* Attachment F to the ED's Response to Hearing Requests. Both the ED and the Applicant's attorneys exaggerate and manipulate the executive summary to argue that the Applicant's discharge is not degrading Little Bay. The executive summary makes no such claim or conclusion. In fact, the executive summary states that Little Bay's seagrass decline is likely linked to high levels of nutrients, specifically high levels of ammonium in the sedimentary porewater. There is little doubt that the full study and oral testimony of its authors will confirm that the Applicant's wastewater discharge is adding to the nutrient loading problems of Little Bay. This study, its conclusions, and its author's testimony are perfect information for the contested case hearing process. If the ED and the Applicant wish to use this study, let them do so properly by presenting the testimony of its authors before a SOAH Judge with cross examination by adverse parties. The full study has not been released and was not part of the application for renewal, the public comments, the public meeting, or the ED Response to

Comments. As such it is inappropriate to consider or use it as part of determination of whether to grant these hearing requests.

V. CAPT. MOORE HAS STANDING

The Applicant spends a significant amount of time and effort misrepresenting and misusing the Austin Court of Appeals' recent decision in *Save Our Springs Alliance, Inc. v. City of Dripping Springs*. *Id.* at 304 S.W.3d 871 (Tex. App.—Austin, 2010, pet. filed). For example, page 11 of the Applicant's Response to Hearing Requests suggests that the holding in *Save Our Springs* prevents standing when the alleged injury involves environmental, scientific, and/or recreational interests without a connection to real property. As the *Save Our Springs* decision explains at length, standing is only limited in the case of specific state law claims. The *Save Our Springs* decision supports standing for environmental and recreation injuries when an environmental statute or program is involved. *Id.* at 304 S.W.3d 871, 882 n.7. The TPDES permit application at issue in this case is a delegated federal program under the Clean Water Act. Whether a person is an "affected person" and has standing to request a contested case hearing under the TPDES program is determined by TCEQ regulations, specifically 30 TEX. ADMIN. CODE §§ 55.203 and 55.205. Federal regulations are binding on the TPDES program as are their standing requirements. 40 C.F.R. § 123.25. The Applicant misuses the decision in *Save Our Springs* in an apparent attempt to mislead and confuse this Commission.

In order to have standing to request a contested case hearing, Capt. Moore must qualify as an "affected person" under 30 TEX. ADMIN. CODE § 55.203. *See* 30 TEX. ADMIN. CODE § 55.201. An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest

common to members of the general public does not qualify as a personal justiciable interest.” 30
TEX. ADMIN. CODE § 55.203.

Capt. Moore owns Rockport Birding and Kayak Adventures and uses Little Bay to conduct sight-seeing tours. Capt. Moore owns three vessels, including the 38 foot *Skimmer* and two approximately 20 foot electric powered craft, which are regularly used for paid sight-seeing and bird watching tours of Little Bay. Capt. Moore’s business has been impacted by the degradation of Little Bay and will continue to be impacted by the proposed renewal.

The Applicant’s discharge has a direct and negative impact on Little Bay’s ecosystem thereby negatively affecting Capt. Moore’s economic interest. The Applicant’s discharge also negatively affects Capt. Moore’s recreational, environmental, and aesthetic interest in Little Bay. Capt. Moore is an “affected person” under § 55.203 and therefore has standing to request this hearing.

VI. CONCLUSION

Capt. Moore respectfully requests that the Commission grant his request for a contested case hearing and that the Commission adopt OPIC’s eight recommended referred issues. *See* OPIC’s Response to Hearing Request at 13-14. Capt. Moore further request that the Commission allow the maximum possible time for this hearing as it involves intricate technical issues that will require detailed expert analysis and opinion under SOAH rules. All parties agree that Little Bay is experiencing and has experienced a significant nutrient related degradation. A Hearing is necessary to develop appropriate permit limitations and bring balance back to the ecosystem of Little Bay.

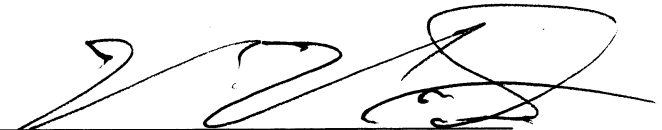
Not long ago, Florida’s Sarasota Bay was experiencing a similar nutrient caused decline. The Sarasota Bay Community successfully reengineered their wastewater treatment plant to

reduce nutrients discharged by approximately 85% and Sarasota Bay has now come back to life. See Attachment 1 (EPA Document on Sarasota Bay). There is an opportunity here for this Commission to save Little Bay. Little Bay is widely considered as a landmark and natural gem of the Texas Coast. If the Commission refers this permit application to SOAH, the end result will be stricter effluent limitations and a resurrection of this important place. A reinvigorated Little Bay will stand as a monument to this Commission's service to the State of Texas.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by

A handwritten signature in black ink, appearing to read 'J.B. Blackburn, Jr.', written over a horizontal line.

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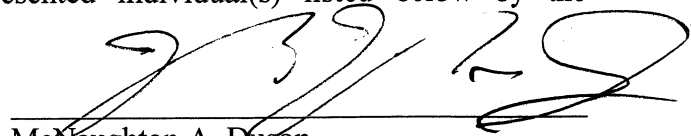
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CERTIFICATE OF SERVICE

On this 2nd day of August, 2010, a true and correct copy of the foregoing instrument was served on the attorneys of record and unrepresented individual(s) listed below by the undersigned via the method indicated below.


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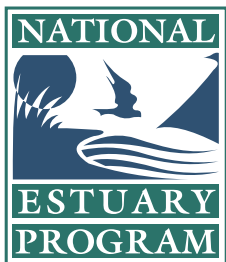
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ATTACHMENT 1



REDUCING NUTRIENT ENRICHMENT



Sarasota Bay spans two counties (Sarasota and Manatee) and is located on the southwest coast of Florida. The area—geologically formed by a chain of barrier islands separating the Bay from the Gulf of Mexico—includes nine municipalities and townships. At less than 150 square miles, the urbanized watersheds are considered relatively small.

Formerly dominated by sawgrass, marsh, and ponds, the watersheds were drained from 1920 through the 1940s for agricultural purposes and the drainage systems were later expanded for stormwater conveyance and waste disposal. By 1990, nitrogen pollution was estimated at 480 percent above pristine and seagrass had declined by 39 percent. By 1998, as macro and blue-green algal blooms persisted, particularly during the summer months, the Bay was listed as impaired for elevated nutrients caused primarily by ineffective wastewater treatment plants, septic tanks, and stormwater from the drainage network. It was discovered that wastewater treatment plants were operating at secondary levels or below (with limited nitrogen removal) and septic tanks were located in inappropriate areas, leading into adjacent waterways.

THE NATIONAL ESTUARY PROGRAM IN ACTION

Sarasota Bay Estuary Program

When developing its Comprehensive Conservation and Management Plan (CCMP), the Sarasota Bay Estuary Program (SBEP) called for the consolidation of small wastewater treatment plants, removal of septic tanks, upgrades of regional treatment plants to Advanced Wastewater Treatment (AWT) standards, and/or the removal of effluent discharge for alternative use. Although stormwater pollution is being addressed, a concentrated effort was made to reduce wastewater pollution, mainly by

proposing that all wastewater discharged to the Bay meet AWT standards of 3mg/l for TN and that all wastewater be reclaimed for alternative supply to reduce aquifer deterioration in southwest Florida. Specific actions SBEP partners took to implement the plan's policies to reduce excessive nutrient levels in the Sarasota Bay watersheds include:

- Manatee County spent \$40 million to establish and implement a no-discharge policy for

wastewater and to construct a reclaimed wastewater system for use in citrus and vegetable operations in eastern Manatee County.

- The City of Sarasota spent \$77 million to upgrade their wastewater treatment plant to AWT technology, provide sewer service to remaining septic areas in the city, and provide reused water to urban and agricultural operations.



EFFECTIVE



EFFICIENT



ADAPTIVE



COLLABORATIVE

- Sarasota County spent an estimated \$50 million to date to build a new regional wastewater treatment facility, provide sewer service to priority areas in the watershed, and consolidate remaining small package treatment plants to the regional facility.

The remaining municipalities were serviced by the larger operations that have resulted in major improvements in water quality. Wastewater loading to Sarasota Bay has been reduced by more than 85 percent as a result of the CCMP policy, and corresponding reductions in chlorophyll and total nitrogen concentrations in the Bay have occurred.

The Florida Department of Environmental Protection (FDEP) has established protective standards as an anti-degradation policy

under the Florida Impaired Waters Rule. SBEP and its partners continue to see improving trends in water quality. Water clarity has increased by .5 meters, with seagrass now growing to depths of 10 feet as total nitrogen concentrations continue to decline and seagrass coverage expands.

In fact, the increase in total seagrass acreage is at 96 percent of what it was in 1950—a total increase of 1,253 acres, and a conversion of patchy to 4,482 acres of continuous seagrass beds.

Equally impressive, in 2008, scallops have returned to portions of the Bay in significant numbers—the highest counts in the State of Florida. Implementation of the “Wastewater Treatment and Reclamation” Action Plan in the CCMP will be

successfully completed in 2015 with removal of the remaining small wastewater treatment plants and the hook-up of the remaining areas on septic systems in priority areas of Sarasota County.

As a result, Sarasota Bay proper has been proposed by FDEP for delisting as impaired for nutrients based on an extensive analysis of chlorophyll levels and sea-grass recovery.

Visit **www.sarasotabay.org** to learn more about this and other SBEP efforts.

EPA's National Estuary Program (NEP) is a unique and successful coastal watershed-based program established in 1987 under the Clean Water Act Amendments. The NEP involves the public and collaborates with partners to protect, restore, and maintain the wa-

ter quality and ecological integrity of 28 estuaries of national significance located in 18 coastal states and Puerto Rico.

For more information about the NEP go to www.epa.gov/owow/estuaries.